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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. [redacted] 57

CHARLES H. PARSONS, Individually and as President of the UNITED TELEPHONE ORGANIZATIONS, etc.,
Petitioner,

vs.

PAUL M. HERZOG, JOHN M. HOUSTON, JAMES J. REYNOLDS, JR., *et al.*, etc.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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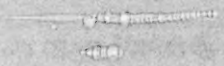

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The Opinion Below.

The Opinion of the Court of Appeals has not yet been officially reported. It appears at pp. 23-32 of the Transcript of Record.

The Opinion of the United States District Court for the District of Columbia has not been officially reported. It appears at pp. 16-18 of the Transcript of Record.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

This case involves a decision of the United States Court of Appeals for the District of Columbia on a question of substance relating to the construction and application of a statute of the United States, namely Section 10(k) of the

Labor Management Relations Act of 1947 (Act of June 23, 1947, C. 120, 61 Stat. 136, 29 U. S. C. Supp. I, Secs. 141 *et seq.*)

Statutes Involved.

The pertinent sections of the National Labor Relations Act (61 Stat. 136, 29 U. S. C. Supp. I, Secs. 141 *et seq.*) are set forth in the Appendix to this Brief. Section 10(k) of the National Labor Relations Act has also been quoted on pp. 2-3 of the Petition for Writ of Certiorari.

The pertinent sections of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. Secs. 1001 *et seq.*) are set forth in the Appendix to this Brief.

Statement.

On pp. 3-6 of the Petition for Writ of Certiorari, which this Brief supports, appears a complete and detailed statement of all the facts which are material to the consideration of the questions presented in this case. It is, therefore, unnecessary to repeat that statement here.

Specification of Errors.

The Court of Appeals erred:

1. In holding that the National Labor Relations Board may refuse, as a result of its own *ex parte* investigation, to heed the mandate of Section 10(k) of the Act to hear and determine the jurisdictional dispute when petitioner charged that an unfair labor practice had been committed within the meaning of section 8(b) (4) (D) of the Act.

2. In holding that the United States District Court for the District of Columbia lacked jurisdiction over the subject matter of petitioner's complaint that the Board did not

accord petitioner a hearing and determination under Section 10(k) of the Act.

3. In holding that petitioner's complaint failed to state a cause of action.

The latter two specifications of error arise out of the first specification of error because the Court of Appeals ruled (a) that the District Court had no jurisdiction over the subject matter and (b) that the petitioner's complaint failed to state a cause of action solely as a result of its construction of Section 10(k) of the Act (R. 24, 32).

I.

It was error for the Court of Appeals to hold that the Board may refuse, as a result of its own *ex parte* investigation, to heed the mandate of Section 10(k) of the Act to hear and determine the jurisdictional dispute when petitioner filed the unfair labor practice charge within the meaning of Section 8(b) (4) (D) of the Act.

The entire crux of this case revolves about an interpretation of Section 10(k) of the Act. It provides:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

When petitioner filed the unfair labor practice charges within the meaning of Section 8(b) (4) (D) of the Act (more commonly known as the jurisdictional dispute),[1] the Regional Director of the Board's Second Region, after permitting the charges to lie dormant for almost a year, notified petitioner that he would refuse "to issue Complaint", because, as a result of an investigation, "there does not appear that there is sufficient evidence of violations to warrant further proceedings at this time" (R. 12).

This very first step in the proceedings of the Board's agent was an erroneous application of Section 10(k) of the Act. That Section calls for holding a hearing and rendering a determination and not for the issuance of complaints. This is clear, especially, from the last sentence of Section 10(k) which provides that the *"charge"* shall be dismissed, if, after a hearing and determination, the parties comply with the Board's determination or voluntarily adjust the dispute.

Furthermore, in addition to his erroneous application of Section 10(k) of the Act, the Board's agent never divulged the considerations (if any) that impelled him, as a result of his "investigation," to refuse "to issue Complaint."

---

[1] Section 8(b)(4)(D) of the Act provides as follows:

"It shall be an unfair labor practice for a labor organization or its agents * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work * * *"

The appeal to the General Counsel was unproductive of results (R. 13) and petitioner appealed to the Board (R. 4). The Board refused to alter the positions taken by the Regional Director and the General Counsel and gave two grounds for its action: (1) that the Board has no authority to review the refusal of the General Counsel "to issue complaints", and (2) that "*Section 10(k) of the Act is not mandatory* and that the Regional Director upon completion of investigation properly refused to issue a notice of hearing" (R. 14). (Emphasis supplied.)

Thus, the position of the Board (in the initial stages of these proceedings) was that "Section 10(k) is not mandatory." Furthermore, the Board sustained the Regional Director "in refusing to issue a notice of hearing" when, actually, the Regional Director never concerned himself with issuing a "notice of hearing" but was concerned solely (and erroneously) with the refusal "to issue Complaint" (R. 12).

It is apparent, from the foregoing, that the paramount reason for the Board's refusal to hold the hearing and render its determination, in this case, was that the Board believed Section 10(k) is "not mandatory" (R. 14), rather than an *ex parte* investigation's disclosures prompted its inaction.[2]

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[2] That expediency (rather than an *ex parte* investigation's disclosures) also played a part in the Board's refusal to hear and determine the jurisdictional disputes is apparent from the following (quoted from footnote 29 on page 23 of the Board's brief submitted to the Court of Appeals in this case):

> "During the first twenty months of the amended Act, the Board had time to adjudicate a total of only 288 contested unfair labor practice cases. *Source:* N. L. R. B. Administrative Statistics Branch. Accordingly, if during this period the Board were required to hear and determine the disputes underlying all 117 of the 8(b)(4)(D) charges which were filed, its performance in other unfair labor practice cases would have been reduced by about 40%. Cf. N. L. R. B., *Thirteenth Annual Report* (Gov't Print. Off., 1949), p. 108."

Despite its initial position that it believed Section 10(k) was not mandatory, the Board, in its presentation before the Court of Appeals, veered to the position that the Section was mandatory but that its preliminary *ex parte* investigation established sufficient basis for its refusal to heed the mandate. Thus, the Court of Appeals said (R. 25):

> "Neither the appellant nor the appellee deny that the words 'empowered and directed' act as a mandate to the Board to hear and determine disputes out of which 8(b)(4)(D) violations have arisen."

But nowhere, at any stage of these proceedings, either administrative or judicial, did the Board reveal any factual or rational considerations disclosed by its preliminary investigation which prompted it to refuse to follow the mandate of Section 10(k).

The foregoing is adverted to in detail because the Court of Appeals permitted the Board to escape the mandate of Section 10(k) through the medium of a preliminary investigation (R. 26, 29, 30, 31). It is respectfully submitted that before any preliminary investigation is permitted to fritter away the mandate of Section 10(k), such investigation should at least attain the dignity of something more than an after-thought, especially where, as here, the after-thought is non-revealing of any considerations whatsoever that led the Board to deny to petitioner an important right to a hearing. The factual situation, presented by the pleadings, is redolent with administrative misconception of duties imposed by statute. It is submitted, therefore, that a belated reliance upon an investigation, the contents of which have never been disclosed either to the petitioner or the Court, should not be permitted to dissipate statutory rights. See *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489 (1942), where this Court said:

> "If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away."

It is further submitted that Section 10(k) does not contemplate having its mandate side-stepped by a preliminary *ex parte* investigation, assuming that the actual basis for dodging the mandate *was* rooted in an investigation instead of a misconception of duties arising under the statute.

The *ratio decidendi* of the Court of Appeals, in rendering its holding was:

1. The Board has the right to conduct investigations, and this right exists, not only independently in Section 10(k), but also generally (R. 26);

2. The Board, under Section 10(k), has the duty to hear and determine *only* such disputes which disclose the existence of an 8(b)(4)(D) violation (R. 26);

3. Therefore, the Board has the right to investigate to determine whether a *prima facie* existence of a violation of Section 8(b)(4)(D) exists; and only if this investigation discloses such violation, need the Board comply with the mandate of Section 10(k) (R. 30).

Petitioner has no quarrel with the proposition that the Board, under the Act, has the *general* power to conduct investigations. Thus, the Board has judicially unreviewable discretion to issue or refuse to issue a Complaint under Section 10(b) of the Act,[3] and, in order to exercise this discretion with something other than whim or caprice, the Board obviously must base such discretion upon the results of an investigation. Also, under Section 10(l) of the Act, the Board is specifically given the right to investi-

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[3] *Jacobsen* v. *N. L. R. B.*, 120 F. (2d) 96, 100 (C. A. 3); *N. L. R. B.* v. *The Barrett Co.*, 120 F. (2d) 583, 586 (C. A. 7); *Lincourt* v. *N. L. R. B.*, 170 F. (2d) 306 (C. A. 1).

gate charges to determine whether a sufficient basis for the truth of such charges exists in order to obtain an injunction until the Board ultimately decides the case. This is necessary because the Board must be able to present to a Court evidence of the existence of unlawful acts before the Court will issue an injunction. No Court would issue an injunction on anything less.

But, merely because the Board has investigatory powers for (1) the proper exercise of discretion under Section 10(b) and (2) for the purpose of presenting a proper case for an injunction under Section 10(l), it does not follow that the Board may employ such investigatory powers for the purpose of evading the command of Section 10(k).

It is submitted that, in permitting the Board, through the medium of a preliminary investigation, to shirk its duties under Section 10(k), the Court of Appeals placed an improper construction upon that Section. This construction is improper because:

(1) it ignores the plain language of Section 10(k);

(2) it dissipates and renders ineffective the mandatory directive of Section 10(k);

(3) it changes the plain meaning of Section 10(k) by an attempted adjustment of that Section with other provisions of the Act.

The above reasons will be taken up *seriatim*.

(1)

There is no doubt that the wording "* * * the Board is empowered and directed to hear and determine the dispute * * *" in Section 10(k) is mandatory.[4]

Shields et al. v. *Utah, Idaho Central Ry. Co.*, 305 U. S. 177, 182 (1938);

[4] The Court of Appeals, also, said neither party disputed this contention (R. 25).

State ex rel. Frohmiller v. *Hendrix et al.*, 59 Ariz. 184, 124 P. (2d) 759;
Matter of Moore Drydock Co., 81 NLRB No. 169.

When does the mandate become effective? The Court of Appeals said, only after a *prima facie* case of violation of Section 8(b)(4)(D) has been established by a preliminary investigation (R. 26, 30). But this construction changes the preliminary wording of Section 10(k) from "whenever it is *charged*" to "whenever it is *found.*"

The Board, itself, in *Matter of Moore Drydock Company, supra,* cautioned against replacing the word "charged" with "found". In that case, the employer filed an 8(b)(4)(D) unfair labor practice charge against the International Association of Machinists. The charge alleged that the IAM picketed a vessel undergoing repairs with the purpose of inducing the employer to give the work to members of the IAM instead of to members of the United Steelworkers of America, who were assigned the work by the employer. The charge was processed under Section 10(k) of the Act.

The entire five-man Board considered the case, and two members of the Board rendered various dissents. In dealing with such dissents, the majority of the Board threw much light on the construction to be placed on Section 10(k). Thus, Board Member Houston protested that the Board need not conduct a hearing at all. To this the Board majority replied:

> "This view obviously grants to the Board *discretion* to determine to what situations Section 10(k) applies in face of the mandatory import plainly implicit in the use of the term 'directed' which carries no such connotation.
>
> We have examined the reference to legislative history cited by our colleague but find no such clear

> expression therein that would, in our opinion, grant the Board the authority to override the unequivocal language of the statutory provision."

Another dissenter, Board Member Murdock, said "* * * the charge referred to must be one that has at least *prima facie* merit." The Board answered this contention in footnote 3 of *Moore Drydock* case, *supra:*

> "Although the I. A. M. contended, at the hearing and in its brief, that in the absence of a prior unfair labor practice finding the Board is unable to proceed under Section 10(k), it withdrew this contention during oral argument. In any event, we find no merit in it. *Section 10(k) uses the language 'whenever it is charged' rather than 'whenever it is found'* or a similar reference to a person who 'has engaged in an unfair labor practice within the meaning of paragraph 4(D) of Section 8(b).' *The word 'charged' is suggestive of an allegation rather than a finding or determination.* We conclude that that is all that is required before the Board may proceed to determine the dispute under Section 10(k)." (Emphasis supplied.)

By permitting the Board, in the case at bar, to escape the duties imposed upon it by Section 10(k) through the use of a preliminary investigation to determine the *prima facie* existence of an 8(b) (4) (D) violation, the Court of Appeals transformed the necessity for an *allegation* to the necessity for a *determination* or *finding* before the mandate of Section 10(k) becomes operative. By thus interpreting "whenever it is *charged*" to mean "whenever it is *found*" or "*determined*", the Court of Appeals does violence to the wording of Section 10(k).

Further examination into the wording of Section 10(k) discloses the error in construction indulged in by the Court

of Appeals. Thus, the mandate to hear and determine the jurisdictional dispute is lifted only if "within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."

Section 10(k) does not permit the mandate to be lifted if the Board indulges merely in a preliminary investigation. It permits the mandate to be lifted only upon the meeting of the statutory requirements by the parties to the dispute. The Court of Appeals has actually written into Section 10(k) a new standard for avoiding the mandate imposed upon the Board. Thus, as construed by the Court of Appeals, the Board need not "hear and determine" the jurisdictional dispute if (a) the parties voluntarily adjust the dispute within 10 days after notice of filing of the charge, or (b) if the Board decides, as a result of its own preliminary investigation, that there is no *prima facie* existence of 8(b) (4) (D) violations. This is statutory emendation, entirely improper in view of the clear language of Section 10(k). "A judge must not re-write a statute, neither to enlarge nor to contract it." Frankfurter, "Some Reflections On The Reading Of Statutes," 47 Columbia Law Review, 527, 537.

Administrative expediency, while perhaps cogent in judicial interpretation of unclear and ambiguous language, is ordinarily not a judicially acceptable basis for writing into a statute something that is not there.[5]

It is submitted, therefore, that the construction of Section 10(k) by the Court of Appeals does violence to the language of that section.

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[5] *Anderson* v. *Wilson*, 289 U. S. 20, 27; *Crooks* v. *Harrelson*, 282 U. S. 55, 60.

(2)

The Court of Appeals has dissipated and rendered ineffective the mandate of Section 10(k) by permitting the Board to shirk the command therein through the medium of a preliminary investigation.

It was noted above (p. 7 and footnote 3), that the Board has the judicially unreviewable discretion under Section 10(b) of the Act to issue or refuse to issue Complaints. It exercises that discretion through the medium of a preliminary investigation rather than upon mere whim or caprice. Under Section 10(b) of the Act as distinguished from 10(k) of the Act, when the Board's Regional Director refuses to issue a complaint after an unfair labor practice charge is filed, he notifies the charging party (as he did in this case) (R. 12):

> "As a result of the investigation, it does not appear that there is sufficient evidence of violations to warrant further proceedings at this time and I am, therefore, refusing to issue Complaint in this matter."

The Board's discretionary power to issue or to refuse to issue complaints under Section 10(b) stems from the permissive language of that section, which states, in part:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, *shall have power* to issue * * * a complaint. * * *"

The wording "shall have power" was held to vest discretionary power in the Board and, consequently, the Board could refuse to issue a complaint.[6] But, the wording

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[6] *Jacobsen* v. *NLRB*, 120 F. (2d) 96 (C. A. 3); *Lincourt* v. *NLRB*, 170 F. (2d) 306 (C. A. 1).

"is empowered and *directed,*" appearing in Section 10(k) is mandatory.

If the Board is permitted to side-step the mandate of Section 10(k) in the very same manner and through the very same use of the preliminary investigation which it employs to exercise its discretion under Section 10(b), then the mandatory language of Section 10(k) has thus been equated with the discretionary and permissive language of Section 10(b).[7] In this way, the mandatory language of Section 10(k) is frittered away and completely emasculated. The right to a hearing under Section 10(k) thus becomes a "ghost, seen in the law, but elusive to the grasp."

This Court, in *Shields et al.* v. *Utah, Idaho Central Ry. Co.*, 305 U. S. 177, 182 (1938), interpreting a statutory directive for a hearing and determination which appeared in the Railway Labor Act (48 Stat. 1185; 45 U. S. C. 151) said:

> "In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to '*determine.*' The Commission must determine '*after hearing.*' The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. *In-*

[7] The use of permissive language in one section of a statute and mandatory language in another, indicates, by the very distinction thus made, that Congress intended the mandatory language to have legal effect. *U. S. ex rel. Siegel* v. *Thoman*, 156 U. S. 353; *Federal Land Bank of Illinois* v. *Hansen*, 113 F. (2d) 82 (C. A. 2); 3 Sutherland, Statutory Construction, p. 116.

> *terstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect."

Administrative agencies, which fail to follow the mandate in the statutes which create them and endow them with whatever powers they have, are judicially corrected.[8] What this Court said, in *Kansas City Southern Ry. Co.* v. *I. C. C.*, 252 U. S. 178, is of pertinent bearing upon the case at bar (See 252 U. S. 178 at 187-188):

> "* * * we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.
>
> It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of rational determination' and called for 'inadmissible assumptions' and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment' and that these

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[8] *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474; *Kansas City Southern Ry. Co.* v. *I. C. C.*, 252 U. S. 178; *Addison* v. *Holly Hill Fruit Products Co., Inc.*, 322 U. S. 607, 622; *Morgan* v. *U. S.*, 298 U. S. 468.

conclusions were the necessary consequence of the *Minnesota Rate Cases*, 230 U. S. 352.

We are of opinion, however, that considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess."

Petitioner submits that the construction of Section 10(k) by the Court of Appeals destroys completely the mandatory effect of that section.

(3)

In support of its holding, in the case at bar, the Court of Appeals adverted to the role of Section 10(k) in the entire statutory scheme of the duty and power of the Board to deal with unfair labor practices. The Court pointed to the power of the Board to issue complaints under Section 10(b) of the Act and to apply for injunctions under Section 10(1) of the Act (R. 28), and that, in both instances, the Board uses its investigatory powers to determine whether it should proceed under such sections. Inasmuch as an 8(b)(4)(D) charge might ultimately be the subject of a complaint to be issued under Section 10(b), the Board (said the Court) has the power to investigate such charge to determine whether or not to issue a complaint. And the Board may, therefore, use the results of this same investigation to determine whether or not to proceed to a hearing under Section 10(k) (R. 28, 29).

Not only does this attempted adjustment of Section 10(k) with other sections of the Act deprive Section 10(k)

of its mandatory effect and do violence to its language, but it also, rationally speaking, puts the cart before the horse. The 8(b)(4)(D) charge proceeds to hearing under Section 10(k), but becomes the subject of a complaint under Section 10(b) *only after* the Board has rendered its determination (in accordance with Section 10(k)), and *only after* one of the parties to the dispute refuses to abide by the Board's determination.[9] Therefore, the investigation necessary to determine whether or not to issue a complaint under Section 10(b) should not be used to determine whether to proceed to a hearing and determination under Section 10(k), where the 10(k) procedure is to take place *before* the 10(b) procedure, and where the mandatory language of Section 10(k) orders the Board to "hear and determine" the disputes.

The attempted adjustment of Section 10(k) with the other (and more discretionary) powers vested in the Board under other subsections of Section 10 of the Act was predicated by the Board upon its *Rutland Court*[10] doctrine. This is apparent from the Board's brief submitted to the Court of Appeals, in the case at bar, on p. 9, footnote 5. There, the Board said:

> "Thus, it was a consideration of the specific provision in relation to the policy and structure of the statute as a whole that led to the *Rutland Court* rule * * *."

The Board's practice of whittling down the effect of one section of the statute by attempting for the sake of administrative expediency, to adjust that section of the statute

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[9] Section 203.77 of the Board's *Rules and Regulations (Series 5)*, (12 F. R. 5656, 13 F. R. 4872).

[10] *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587; 46 N. L. R. B. 1040.

with another section was discouraged and set aside as an illegal assumption of power by this Court in *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U. S. 355 (1949).

In view of the foregoing, it is respectfully submitted that the Court of Appeals erred in its construction of Section 10(k) of the National Labor Relations Act.

II.

The Court of Appeals erred in holding that the United States District Court lacked jurisdiction of the subject matter.

The Court of Appeals ruled that, inasmuch as it construed Section 10(k) as not commanding the Board to hold a hearing in the case at bar, it followed that the District Court lacked jurisdiction of the subject matter (R. 24, 32).

Petitioner has argued (in Point I, *supra*) for his contention that the Court of Appeals erred in its construction of Section 10(k). However, should petitioner be upheld in his contention, the question of jurisdiction of the District Court still arises, especially since the Board vigorously raised the question in the lower courts.

The District Court had jurisdiction of the subject matter (a) under its general equity jurisdiction (Section 24(8) of the Judicial Code, 28 U. S. C. Section 1337) and (b) under the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. Section 1001 *et seq.*).

If the District Court had refused to take jurisdiction of this matter no remedy would exist to enforce the statutory command Congress wrote into Section 10(k). A Court may not review discretionary exercise of power when a statute expressly grants such discretion to the agency exercising it. But, where, as here, a statute specifically *com-*

mands an agency to act and specifically removes discretion on the part of the agency to refuse to act, how else but through its equity powers can a Court force that agency to abide by the statutory command?

In this respect, the dictum of Mr. Justice Douglas in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 300, is pertinent. He said:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & N. O. R. Co.* v. *Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548 and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515. In those cases it was apparent that *but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands* which Congress had written into the Railway Labor Act." (Italics supplied.)

See also:

> *Stark* v. *Wickard*, 321 U. S. 288;
> *Work* v. *Rives*, 267 U. S. 175;
> *Louisiana* v. *McAdoo*, 234 U. S. 627;
> *Marbury* v. *Madison*, 1 Cranch. 137, 165-166;
> *American Chain & Cable Co.* v. *F. T. C.*, 142 F. (2d) 909 (C. A. 4).

In *U. S. ex rel. Chicago G. W. R. R. Co.* v. *I. C. C.*, 294 U. S. 50, the United States Supreme Court distinguished between situations where it would review administrative action and situations where it would not review such action. The dividing line was pricked out by determining whether the statute involved gave the administrative agency *discre-*

tion to act or whether it *commanded* the agency to act. Thus, on page 60 of that decision, the Court said:

> "Where judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ to compel a different conclusion."

Then, on page 61, the Court added:

> "If, on the other hand, power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and to hear the case upon its merits."

It is submitted that the instant case was reviewable by the District Court in its exercise of general equity jurisdiction because it involves a situation where a government agency is, by statute, commanded to hold a hearing and has refused to do so, and because that agency's discretionary exercise of power is not involved in the review.

This conclusion is, further, bolstered by the Administrative Procedure Act. Pertinent portions of Section 10 of that Act provide:

> "Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion——
>
> (a) Right of Review.—Any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof.
>
> * * * * * *
>
> (c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any Court shall be subject to judicial review.
>
> * * * * * *

> (e) Scope of Review.—So far as necessary to decision and where presented the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. It shall (A) compel agency action unlawfully withheld * * *."

The case at bar does not come within either of the exceptions set forth in the first sentence of Section 10 of the Administrative Procedure Act. Consequently, the provisions of that Act operate to accord petitioner herein the relief prayed for in its "Complaint for Injunction".

An examination into the provisions of the National Labor Relations Act indicates conclusively that nothing in that Act either expressly or impliedly "precludes judicial review" in a situation such as that presented by the case at bar.

In view of the foregoing, it is respectfully submitted that the District Court had jurisdiction of the subject matter under its general equity powers and also under the Administrative Procedure Act.

III.

The Court erred in holding the complaint failed to state a cause of action.

The Court of Appeals concluded that the complaint herein failed to state a cause of action as a result of the Court's determination that the Board was not commanded, by Section 10(k), to hold a hearing in this matter.

Petitioner submits that, if this Court holds Section 10(k) required the Board to "hear and determine" the disputes giving rise to petitioner's 8(b) (4) (D) charges, the complaint states a cause of action.

Petitioner's right to a hearing is not, as the Board argued in the Court below, a "public" right, enforceable solely by the Board. If petitioner's grievance was that third persons committed unfair labor practices, of which petitioner was a victim, the right to have such unfair labor practices dealt with in accordance with the National Labor Relations Act is undoubtedly a "public" right enforceable by the Board alone.[11] But the case at bar is more properly determined by principles enunciated in *Stark* v. *Wickard,* 321 U. S. 288; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *Work* v. *Rives,* 267 U. S. 175; *American Chain and Cable Co.* v. *F. T. C.,* 142 F. (2d) 909, (C. A. 4), namely, that where a statute gives a person a right to a hearing and requires the administrative agency involved to conduct such hearing, "such a right created by statute is mandatory in character and obviously capable of judicial enforcement" (*Stark* v. *Wickard, supra,* on p. 303).

In a Note in 38 Harvard L. R. 377, entitled "Enforcement of Duties Under the Labor Provisions of the Transportation Act", we find the following pertinent observation:

> "But where the legislature has used mandatory words, has imposed express 'duties', but has failed to provide effective remedies for their breach, the courts habitually apply these rules of interpretation to fill the gaps in the legislature's work and to give those injured by violations of the statute such remedies either at law or in equity as best carry out its purpose. For if no one may have relief for another's violation of such a statutory duty, the legislative imposition of the duty is just so much talk."

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[11] *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 265; *Bakery & Sales Drivers* v. *Wagshall,* 333 U. S. 437; *Amalgamated Ass'n. etc.* v. *Dixie Motor Coach Corp.,* 170 F. (2d) 902 (C. A. 8).

The situation presented by the instant case, and the allegations contained in the "Complaint for Injunction" (R. 1-14), state a cause of action to which Section 10(e) of the Administrative Procedure Act is particularly applicable to authorize a federal court to "compel agency action unlawfully withheld."

Conclusion.

It is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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Appendix.

The relevant provisions of the Labor Management Relations Act, 1947 (Act of June 23, 1947, C. 120, 61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 *et seq.*) are as follows:

Title I—Amendment of National Labor Relations Act.

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * *

"National Labor Relations Board

* * * * * *

"Unfair Labor Practices

"Sec. 8. * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

"(4) to engage, in or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

* * * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any

person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint; *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based

thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States

for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under sub-

section (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * *

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly author-

ized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

* * * * * *

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A., Secs. 1001 *et seq.*) are as follows:

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency

action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitu-

tional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."